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## UCITA Revisited

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# UCITA Revisited

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**"UCITA: A Bad Law Protecting Bad Software"** (*Against the Grain* February, 2002, pp. 81-5) commented on several objections to the proposed **Uniform Computer Information Transaction Act (UCITA)**. The **National Conference of Commissioners on Uniform State Laws (NCCUSL)**, the organization behind **UCITA**, approved several changes to the proposed legislation at its annual meeting July 26-August 2, 2002, hoping to win over opponents and ease passage of the law which has been in development for more than a decade.

So far, only Maryland and Virginia have adopted **UCITA** since 1999. Three other states (Iowa, North Carolina, and West Virginia) have passed legislation that explicitly blocks the enforcement of parts of **UCITA**. Most of the remaining states are either doing nothing or considering their own anti-**UCITA** legislation. Iowa led the country in developing bomb-shelter legislation to protect Iowa customers, consumers, and businesses from **UCITA** or **UCITA**-like laws in other states. The bomb-shelter law intends to reverse **UCITA**'s provision and make Iowa laws applicable to transactions between an Iowa party and a party that tries to invoke the law of a **UCITA** state.

The **NCCUSL**, trying to avoid losing a decade's worth of work on carefully crafted compromises and agreements, adjusted **UCITA** by making the smallest possible changes to fix its problems. The **NCCUSL** approved thirty-eight amendments at its annual meeting. Most of the changes were cosmetic in nature: dividing some sections, re-numbering and re-wording others. The important modifications stipulate:

- Vendors won't be allowed to disable systems in contract disputes.
- **UCITA** won't override state consumer protection laws.
- Vendors won't be able to silence critics through contracts.
- Reverse engineering will be allowed for interoperability.

## "Self-Help"

**UCITA**'s so-called "self-help" provision (Section 816) allowed vendors to disable systems in contract disputes. While the **NCCUSL** eliminated the self-help provision for mass-market software sold via retail channels, it retained the provision for other types of software, such as customizable applications purchased by companies.

Even though **UCITA** has removed some of the language allowing vendors to booby-trap their products and to disable systems in

contract disputes, it included a new passage in section 815 that gives a licensor the right to erase software by electronic means. Software producers also have the technical ability to secretly embed a time bomb in their software that can shut it off automatically at a given date unless the customer pays a license renewal fee and registers the program. (The CD-ROM specification permitted this capability since the early 1980s; but only a few publishers ever implemented it.) This could open the door to a software publisher who wants to get more business from a customer to extort a little more money just to keep using the software (and the data) he already has. It also allows publishers to force buyers to upgrade to new versions of software, when they become available, by automatically disabling the software at a set time or under certain conditions.

Some analysts say that eliminating the section on electronic self-help is insignificant for corporate users because an organization that buys a large quantity of off-the-shelf software probably wouldn't be included in the definition of a mass-market customer. This would also apply to any applications purchased via a site license, virus updates, and software products bought through a subscription service.

One of the biggest drawbacks of **UCITA** for organizations isn't that their software could be turned off, it's that **UCITA** still gives vendors the ability to sell systems with secret back doors and permits "a human element of control" over an organization's business systems whereby vendors can open up security holes in an institution's systems. **UCITA** lets vendors create a hole in an institution's security at no risk to themselves because it imposes no liability on the vendors.

While the amended version of **UCITA** eliminates the self-help provision, vendors can still change contracts to include terms that are more acceptable to them because, in signing a contract, end users give their specific consent to the terms of that agreement.

## UCITA Won't Override State Consumer Protection Laws

Another amendment (section 104) gives precedence to local consumer protection laws when they are in conflict with **UCITA**. However, **UCITA** still contains certain clauses that

let vendors alter agreements after payments are made and set limits on liability. Manufacturers can still disclaim warranties of sale and enjoy immunity from lawsuits in the event computer programs have defects. Sections 402 (express warranty), 403 and 404 (implied warranty) only received some minor changes in wording with the exception of one significant addition: subjective characteristics of information content, such as the aesthetics, appeal, and suitability to taste are not covered by warranty. A new section 410 states that implied warranties apply only to commercial software.

The wording of Section 110 was loosened to allow litigants to agree on the judicial forum. The location is particularly important because a selected forum may be far away from where the consumer lives or it may have laws more favorable for a particular company or industry. If the choice is unreasonable or unjust, a court in the state in which the action is brought will decide on the forum.

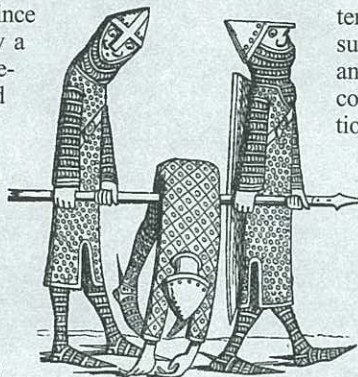
## Vendors Won't Be Able To Silence Critics Through Contracts

The earlier version of **UCITA** contained a clause that restricted public discussion or criticism of products or of the information contained in them. Based on nondisclosure and beta agreements which laid the foundation for restricting free speech under contract law, **UCITA** would have further prevented journalists and reviewers from doing their job in comparing products and writing critical reviews to inform their readers about software strengths and weaknesses. The amended version allows consumers to criticize software products publicly without fear of retribution from software makers.

Although the amendments loosen some of the restrictions on lending and transferring software, they still generally prohibit transfers, particularly for commercial software. A new clause specifically allows the transfer of a license for mass-market software when it is a gift or donation a) to a public elementary or secondary school, b) to a public library, or c) from a consumer to another consumer.

The changes do not address adequately **UCITA**'s impact on "shrink wrap" and "click on" (for software downloaded from the Internet) licenses that typically accompany the sale of electronic software and restrict how consumers use the products. **UCITA** intends

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to make these contracts enforceable; but opponents say the law will still allow vendors to institute restrictive contract terms. Software manufacturers claim that these restrictions ensure that consumers do not freely distribute the products. Scholars and librarians say the restrictions stifle consumers' freedom of speech and undermine their fair use of products they've paid for.

### Reverse-Engineering Will Be Allowed For Interoperability

Another major change in UCITA is the addition of Section 118 that specifies the terms for reverse engineering. Whereas the previous version of UCITA prohibited any tampering with software, the new section allows consumers to study how a piece of software works so that it can be made compatible with other technologies — a process known as reverse engineering. This amendment came at the request of the **American Committee for Interoperable Systems** which comprises vendors such as **Sun Microsystems, Inc.** and **NCR Corp.** The committee fought for reverse engineering for the purposes of interoperability and obtained approval.

### Not Enough Changes

UCITA aims to make the rules for software contracts and license agreements more consistent and uniform for all fifty states. A uniform law would reduce potential confusion for both software vendors and customers and make buying and selling software much easier. The difficulty is coming up with a law that everyone can agree on. UCITA has a lot of opposition from businesses, library associations, and consumer groups. Academic library groups oppose a law intended to make software-licensing agreements uniformly enforceable in all 50 states because the changes to UCITA, though a step in the right direction, don't go far enough to protect scholars' interests.

A nine-member committee of the **American Bar Association** acknowledges that there is a need for a uniform law governing software licensing transactions; but it questions whether UCITA should be that legislation. The committee has several areas of concern. One deals with remote access. UCITA's drafters want to prohibit it; but the ABA says there is still a loophole. Related to remote access are the terms of the license. With click-on or shrink-wrap licenses, end users often see the terms only after agreeing to the license. They should see them before payment.


Another area of concern involves the scope of UCITA. UCITA understands "computer information" to include everything from copyrighted expression, such as stories, computer programs, images, music, and Web pages to other traditional forms of intellec-

tual property such as patents, trade secrets, and trademarks to newer digital creations such as online databases and interactive games. While UCITA claims to be limited to information in electronic form, it allows other transactions to "opt-in" to being governed by UCITA. Electronic commerce portals, computer hardware vendors, and maybe even automobile manufacturers could "opt-in" to UCITA's provisions if they wish. There remains a question as to whether UCITA applies to goods that contain built-in software.

Consumer advocates are concerned that practices allowed by UCITA will spread quickly beyond the software industry. UCITA is so broad that it even includes mass-market licensing of electronic books which can be eventually extended to include printed books. It can even cover materials and information in the public domain, including those already protected by intellectual property law.

UCITA's proponents hope the changes eliminate some of the opposition. However, several opponents say the modifications are

not extensive enough. Instead of performing a major overhaul of UCITA, the NCCUSL has only applied patches. Patches to legislation, like patches to faulty software, do not solve the problems. They are temporary solutions that really do not benefit anyone in the long run.

Nonetheless, the NCCUSL, based in Chicago, intends to renew its efforts to obtain state-by-state adoption. A special committee of the **American Bar Association** that called for a major rewrite of UCITA last year probably will not support the revised version. The **American Library Association** and some software developers also oppose UCITA because it still gives vendors the ability to sell systems with secret back doors. **Carlyle Ring**, a former general counsel at **Atlantic Research Corp.** in Gainesville, Fla. and the head of the UCITA drafting committee, acknowledges that UCITA may undergo further changes; but any more modifications will have to wait until the next annual meeting of the NCCUSL next summer. 

## Biz of Acq — Examining the Worth of Information

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*Column Editor's Note: Audrey Fenner, Acquisitions Librarian at the University of North Carolina at Greensboro, asks us to think about the actual value of the information that we buy and sell—not the price, but the real worth. Presumable price should be based on real worth or value, and we should have some idea of worth or value when determining how much we will charge or pay for something. However, when it comes to information, I suspect that librarians will pay whatever is being charged, and publishers will charge whatever they think librarians will pay, simply because it's usually almost impossible to determine the real worth or value of information. Audrey explains why.*

*Audrey's article was previously published in the Spring 2002 issue of **Library Philosophy & Practice** (<http://www.uidaho.edu/~mbolin/lp&p.htm>) with the title "Placing Value on Information." — MF*

### Abstract

Society regards information as a commodity and the possession of it as an asset. Economists would like to account for information in the same way as physical assets but no discipline has given us an accepted model for such treatment. Disciplines regard information differently, and it is more difficult to develop systems to measure information

than physical commodities. The price system has been used to assign value to information, but does it provide the best means? Can librarians plan for the future, justifying increasing expenditures to their funding agencies, in the

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